ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection	)	**MD Docket No. 96-186**
of Regulatory Fees for	)	
Fiscal Year 1997	)	

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA"),[1] by its attorneys, hereby submits its comments on the Further Notice of Proposed Rulemaking in the above-captioned docket.[2] To promote efficient and fair collection of the increasingly higher annual regulatory fees, the *Further Notice* proposes to modify the Commission's fee collection procedures for

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[1] PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, FCC 97-254 (July 18, 1997) ("*Further Notice*"). The *Further Notice* was published in the Federal Register on July 25, 1997, 62 Fed. Reg. 40036. Comments accordingly are due August 14, 1997.

regulatory fees. The Commission hopes adoption of the proposed rule requirements will "help assure increased accuracy and timeliness of regulatory fee payments."[3]

PCIA has a number of concerns about the practical and competitive effect of the two proposals set forth in the *Further Notice* that will directly affect the commercial mobile radio service ("CMRS") industry and PCIA's members. First, to the extent the Commission is proposing to require CMRS licensees to maintain a new set of documentation underlying their fee payments, that obligation is unnecessary in light of the enforcement tools already available to the Commission and would impose inappropriate new burdens on licensees. In any event, the Commission needs to ensure that it fully protects the confidential nature of the information. Second, the proposal to publish a list of regulatory fee payers, payment amounts, and number of units forming the basis for the payment should be abandoned because it is unnecessary and will work to the competitive disadvantage of many carriers.

I. THE COMMISSION HAS ADEQUATE ENFORCEMENT MECHANISMS ALREADY AVAILABLE TO IT, AND THERE IS NO JUSTIFICATION FOR IMPOSING NEW DOCUMENTATION REQUIREMENTS ON CMRS LICENSEES

In its *Further Notice*, the Commission proposes to require CMRS licensees to maintain (for three years) and to make available to the Commission upon request (within 30 days) documentation concerning the basis for their fee payments.[4] The *Further Notice* asserts that this record keeping requirement "is necessary in order to assure that fee payments are accurately

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[3] *Further Notice*, ¶ 1.

[4] *Id.*, ¶ 2.

prepared and reliable."[5] The Commission indicates that acceptable documentation would include "reports to other government agencies, billing records, certified financial statements or other records that demonstrate the accuracy of the fee payment."[6] At the same time, the Commission concludes that retaining the required documentation "should constitute little, if any burden," and represents that its intention is to minimize as much as possible the burden on CMRS licensees in documenting the basis for fee payments.[7]

The Commission's statements suggest that the enumerated documentation is already maintained by CMRS licensees in some readily accessible format. In many cases, however, CMRS licensee determinations as to the number of units to be reflected in the regulatory fee payment are based on several sources of information, and are *not* reflected in a single document or readily accessible documents that can be produced on 30 days' notice. For some carriers, the only record that conclusively shows the number of units as of December 31 during the applicable fiscal year is the regulatory fee filing made with the Commission.

To create new records and tracking systems, or to alter existing billing recordkeeping to maintain the documentation sought by the Commission – if that is what the *Further Notice* in fact contemplates – would impose significant and costly burdens on the CMRS industry. Such costs must be recovered in some fashion. Increasing the rates to subscribers is not necessarily a feasible option, however, given the highly competitive nature of CMRS offerings and in light of numerous other regulatory requirements recently imposed on this and other segments of the

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5 *Id.*

6 *Id.*, ¶ 3.

7 *Id.*

telecommunications industry. Significantly, only CMRS providers would be subject to this new set of obligations and costs, disadvantaging them vis-à-vis other potential competitors.

Imposing new regulatory burdens on the CMRS industry and possibly undercutting an already competitive marketplace runs contrary to the goals of the Telecommunications Act of 1996[8] as well as the Commission's stated deregulatory initiatives. As suggested below, there are alternative means for the Commission to verify the number of units that provide the basis for any particular carrier's regulatory fee payment.

Some of the documentation examples listed in the *Further Notice* imply the Commission is looking for independently verifiable reports demonstrating a carrier's number of units – such as reports to other government agencies or certified financial statements. At present, CMRS licensees generally do not submit reports to other government agencies that would specify the number of their pagers, cellular phones, or PCS handsets by specific company. Likewise, certified financial statements may not include such data. Depending upon their detail, billing records themselves also may not demonstrate number of units.[9] Thus, should the Commission proceed to impose the proposed documentation requirement, its examples of documents do not

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[8] *See, e.g.*, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. 1 (1996).

[9] For example, because of the technological capability of PCS to permit assignment of multiple phone numbers to a single handset as well as the assignment of a single number to multiple handsets, the application of the Commission's definition of unit used to determine the PCS fee payment amount is unclear. Also, CMRS licensees are responsible to pay fees covering the units marketed by resellers on their systems. Given the nature of the business relationships between carriers and their resellers, that information may not be readily available to the paying licensee.

provide useful guidance. Instead, the Commission should direct that CMRS licensees retain whatever documents were used to calculate their regulatory fee payments.[10]

PCIA understands the Commission's desire to ensure that all affected entities are shouldering their share of the regulatory fee burden. In lieu of adopting a new set of regulatory recordkeeping requirements, the Commission should continue to rely on its existing authority to conduct audits[11] where it has a reasonable basis for concluding that a CMRS licensee (or any other payer) has failed to provide an accurate count of units. If the Commission has any questions about the number of units identified by a CMRS licensee, the staff first should call the licensee. There may be a logical explanation that obviates any need for further Commission review. If an audit is considered appropriate, it could be structured to place much of the burden on the licensee to produce and compile the information. The Commission can require licensees simply to retain and make available during an audit those materials relied upon to calculate the number of units rather than creating new obligations. This approach strikes a balance consistent with the public interest.

Finally, should the agency ultimately resume production of certain figures, the Commission should ensure that any materials forwarded to the Commission are adequately protected from public disclosure to the extent appropriate. Pursuant to Section 0.457(d) of the

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[10] To the extent paging companies report units in service, there is not complete clarity. Some companies report only pagers in service while others include voice mail and other enhanced services in the total units in service.

[11] *See In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 59 Fed. Reg. 30984, 30994 (the Commission has the authority to "perform periodic, random audits" to determine whether regulatees have properly reported information that the Commission has requested).

Commission's Rules,[12] in the context of commercial or financial information, the Commission is authorized to withhold from public inspection "materials which would be privileged as a matter of law if retained by the person who submitted them, and materials which would not customarily be released to the public by that person, whether or not such materials are protected from disclosure by a privilege." Section 0.457(d) specifies certain categories of submissions that will not routinely be made available for public inspection.

Many of the records that might be used by a CMRS licensee to calculate its annual regulatory fee payment are documents that ordinarily would not be released to the public – such as billing data or certain financial information. In fact, there may be some items of information that cannot be publicly disclosed consistent with the obligations imposed on licensees that are publicly traded. At the very lease, the nature of any record production requirement should be limited to broad categories like numbers or categories of units in service, which provides only that information sufficient to determine compliance with the fee schedule. No information regarding individual subscribers or customers should need to be produced.

Rather than impose a burden on both CMRS licensees and the Commission staff to file and process requests for confidential treatment under Section 0.459 of the Commission's Rules each time the Commission requests CMRS documentation, the Commission should add another category of protected documents under Section 0.457(d)(1) (similar to the financial reports enumerated in Sections 0.457(d)(1)(i), (iii), or (iv)). This will conserve the use of Commission and licensee resources, while guarding against inappropriate public disclosure of confidential information.

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[12] 47 C.F.R § 0.457(d).

II. THE COMMISSION SHOULD NOT PUBLISH REGULATORY FEE PAYMENT INFORMATION BECAUSE IT IS UNNECESSARY TO ACHIEVE THE COMMISSION'S STATED GOAL AND WOULD COMPROMISE COMPETITIVELY SENSITIVE INFORMATION

The Commission has proposed to publish annually in the Federal Register lists of those commercial communication firms and businesses that have paid a regulatory fee for the preceding fiscal year.[13] The information to be published would include "the amount of the fee paid and the volume or units upon which the fee payments were based."[14] The *Further Notice* indicates that fee payers may request confidential treatment of proprietary information.[15]

The *Further Notice* states that the goal of the publication requirement is to "enable fee payers to verify that their payments have been properly recorded and to bring errors to [the Commission's] attention."[16] There are, however, verification and error correction methods that can be implemented without the Commission publishing fee payment information.

Any perceived value in publishing the fee payment information as proposed in the *Further Notice* is far outweighed by the significant harm associated with the disclosure of confidential, competitively significant information. Specifically, disclosure of the number of CMRS units underlying a carrier's fee calculation as well as the fee amount itself (since it can be

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13 *Further Notice*, ¶ 6.

14 *Id.*

15 *Id.*

16 *Id.*

used to derive the number of covered units)[17] provides competitively sensitive information to competitors that otherwise may not generally be publicly released, particularly by smaller carriers or on a market-by-market basis.[18] This data provides critical insight about customer base and market penetration. Access to such information could distort the marketplace while providing only limited benefit in terms of the Commission's stated objective for this publication plan.

PCIA understands that parties may request confidential treatment for CMRS unit information, and that many CMRS licensees may in fact already do so.[19] Commission review and action on such confidentiality requests as it prepares to publish the proposed report would consume substantial staff resources. If significant numbers of confidentiality requests are granted, then the published listing will not achieve the goal set forth in the *Further Notice*. In that case, the resources spent processing the confidentiality requests instead would be more productively used in implementing alternative methods of fee verification by the fee payers themselves (if that is the Commission's objective) that do not pose the harm of disclosing confidential, competitively significant information.

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[17] Specifically, using simple mathematical calculations, the amount of the fee payment can, in many cases, be divided by the per unit charge to calculate the number of pagers, PCS handsets, or cellular phones included within a payer's calculations.

[18] For example, competitors could determine market share for specific markets from such data or could use this data for privately held companies.

[19] PCIA continues to believe that CMRS unit information should be routinely excluded from public disclosure under Section 0.457(d) without requiring the submission of a separate confidentiality request.

III. CONCLUSION

For the reasons stated above, the Commission should reconsider any effort to impose a new set of recordkeeping obligations on MCRS licensees. Rather, the Commission should rely on its existing audit authority, supported by a requirement that licensees retain those documents actually relied upon to calculate the number of units. The Commission should ensure that such materials, if produced to the Commission, are fully protected from public disclosure pursuant to Section 0.457(d) of the Commission's Rules.

The Commission also should forego implementing its proposal to publish regulatory fee payment information on an annual basis. Publication of CMRS unit information and fee amounts can result in disclosure of competitively significant information (about customer base) that otherwise would not normally be made publicly available. There are alternative methods for the Commission to achieve its goal of permitting affected entities to verify that the Commission has correctly received and recorded their fee payments.

Respectfully submitted,

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August 14, 1997